No. 93-631

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE PHILADELPHIA ELECTRIC COMPANY, et al.
Petitioners

v.

HERBERT L. FISCHER, et al.,
Respondents

THE PHILADELPHIA ELECTRIC COMPANY, et al.
Petitioners

v.

DONALD R. KURZ, et al.,
Respondents

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Third Circuit Court of Appeals correctly hold that: (1) Philadelphia Electric Company, the Plan Administrator of the Service Annuity Pension Plan, has a fiduciary duty under ERISA to speak truthfully when answering questions posed by plan participants about possible changes to the pension plan which are under serious consideration; and that (2) there are genuine issues of material fact in dispute regarding whether affirmative misrepresentations were made to the plaintiffs about possible changes to the Service Annuity Pension Plan at a time when PECo was seriously considering such changes, thereby precluding summary judgment?

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STATEMENT OF THE CASE

Petitioners, Philadelphia Electric Company (hereinafter "PECo"), et al. have requested this Court to review two separate cases under ERISA. In both of these cases, respondents claim that PECo breached its fiduciary duties under ERISA as a plan administrator when it made material misrepresentations about possible changes to the pension plan at a time when such changes were under serious consideration.[1]

As framed by the Petitioners in the Statement of the Case, the specific issue PECo presents to this Court contains an obvious omission; that is, the issue decided by the Third Circuit Court of Appeals concerned whether fiduciary duties under ERISA are applicable to the communications of not just an employer, as stated by Petitioners, but an employer who is also a plan administrator. This is significant because, as the Third Circuit correctly determined, "the fiduciary obligations owed to the participants were owed by PECo as plan administrator." [Fischer v. Philadelphia Electric Co., 994 F.2d 130, 135 (3d Cir. 1993)]. The issue as framed by the Petitioners also contains a flagrant misstatement; that is, the respondents did not concede that the miscommunications at issue concerned matters which are business in nature and which do not involve the administration of the Plan. To the contrary, respondents have always maintained that the misrepresentations concerned important information about their pension benefits which was necessary for them to make an informed decision regarding retirement.

Furthermore, it is patently untrue that the parties in each of the cases have agreed that the facts are not in dispute. True, joint stipulations of fact were filed with the District Court on order of the Court. However, there were numerous other facts to which the parties could not stipulate and, therefore, the parties agreed that they were not limited to the Joint Stipulation of Facts but that references

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[1] It should be noted that the respondents also have asserted claims of discrimination and estoppel. The Petitioner has not sought review of the discrimination or estoppel claims.

could also be made to facts in depositions and documents. Indeed, respondents offered to both the District Court and the Court of Appeals Proposed Findings of Facts which include many of these disputed facts. Finally, the issue presented by the Petitioners is not of the caliber requiring intervention by the United States Supreme Court.

C. Factual Background

1. The Fischer Case

On April 19, 1990, Joseph Paquette, the President, Chief Executive Officer and Chairman of the Board of PECo announced a decision to recommend that the Board of Directors amend PECo's Service Annuity Plan to implement an early retirement incentive program. This lucrative program, enacted on May 25, 1990, provides a lifetime of enhanced pension benefits for employees who elected this option. Had respondents still been employed by PECo when this program came into effect, they would have been eligible to participate in the plan. Unfortunately, they retired before this announcement because they were led to believe that PECo was not considering plans to offer a retirement incentive program in the near future.

That is, PECo had a standard procedure for processing retirement applications which required the Department of Human Resources to conduct a retirement interview with the potential retiree in order to provide information about benefits. During late 1989 and early 1990, the majority of these retirement interviews were conducted by John McCartney, the Senior Benefits Counselor. Mr. McCartney candidly testified during his deposition that most of the employees who were going to retire from January to April, 1990 questioned whether there were going to be any changes to the pension plan. Rumors to this effect had been circulating throughout the company, thereby prompting the employees' questions which in turn caused Mr. McCartney to ask his supervisor, Michael Crommie, the Director of the Benefits Division of the Human Resources Department, on two or three occasions if he was aware of any changes to the pension plan being contemplated. Mr. McCartney knew that prospective retirees were asking whether there

were plans to change the pension so they could defer their retirement in order to take advantage of any amendments to the pension plan and, therefore, he saw it as his responsibility to give as accurate and as complete as possible an answer to their questions. Mr. Crommie admits that during 1989 his staff advised him that they were getting an increasing number of questions from employees about a retirement incentive. He also admits that he and his staff:

> "went over and made sure that our answers were consistent in that we had no knowledge of any plan - an early retirement plan that was being generated, studied, implemented, so that was the consistent answer that we and I (Mr. Crommie) instructed the staff to give to that question of whether or not there was a sweetener in the wind, whether the company was working on a sweetener." [Crommie Deposition, p. 84].

Unfortunately, Mr. Crommie did not see it as part of his responsibility, in order to assure that his answers were complete, truthful and accurate, to obtain information from other sources; his reasoning – "if management wanted me to know anything, they would have instructed me so." [Crommie Deposition, pp. 85-86]. Thus, he directed his subordinates in the Benefits Division to consistently claim lack of knowledge about the status of a retirement incentive program without, by his own admission, first ascertaining the relevant facts from those managers and officers at PECo who would be in a position to know this information. As a result, respondents, all loyal, trusting and long-term employees, were misled to believe there were no plans for an early retirement package. Plaintiffs' Answers to Defendants' Interrogatories documenting this point were relied upon by the Court of Appeals as providing sufficient evidence of misrepresentation to preclude summary judgment in favor of PECo.

Contrary to the representations made to respondents, plans to offer an early retirement program as a means of reducing the bloated PECo work force had been initiated two years earlier. In March, 1988, management personnel in the Employees Services Division of PECo recommended amending the PECo Service

Annuity Plan to offer an early retirement sweetener as a means of achieving a reduction in the work force. From March through June, 1988, Towers, Perrin, Forster & Crosby (hereinafter "TPF&C") was consulted by PECo to address certain options for an early retirement program. TPF&C worked closely with senior management personnel at PECo, including defendant, Michael Crommie, in developing various early retirement options and in June, 1988 presented a detailed calculation of costs for open window programs, including a program to be effective January through July 1989, which was remarkably (and curiously) similar to that which is the subject of this lawsuit.

These proposals were being explored in 1988 by senior management in part because of the fear that PECo was headed for bad financial times, including the possibility that the Pennsylvania Public Utility Commission (PUC) would not grant the rate increase PECo was looking for in the future. However, there was an "ongoing concern" that if PECo had a voluntary early retirement "sweetener" and incurred additional costs, the PUC would not allow PECo to recover the additional costs in the rate base. Apparently, this concern resulted in tabling the proposal for a retirement incentive until after the PUC rate increase request was decided.

In July, 1989, PECo filed the request with the PUC for a $549 million rate increase. Given that Mr. Paquette believed that the financial future of PECo hinged on the rate decision, it is not surprising that he immediately implemented plans to reduce costs in the event that PECo did not receive the full rate increase. In July, 1989, he discussed with Mr. Friderichs, the Manager of Corporate Planning and Analysis, the need for a strategic plan for the financial future of PECo, and in early August, 1989, requested him to identify outside consultants to assist in such efforts.

When PECo learned in October, 1989 that the PUC staff had recommended that PECo receive less than half the rate increase requested, the urgency to prepare for the eventuality of not getting its full rate increase was heightened. Therefore, in November, 1989, PECo hired McKinsey and Company, a consulting firm, to assist in the development of a new corporate strategy. One of the aspects which McKinsey studied was staff reduction. The efforts

to develop an early retirement program escalated in March, 1990, after the Administrative Law Judges issued an interim decision on PECo's rate increase application, recommending that it receive only 21% of the full amount requested. PECo management was well aware that the PUC's final decision is generally very close to the ALJ's report. Therefore, Kenneth Lefkowitz, the Manager of Compensation and Benefits Division, began outlining options for reducing the work force. On March 12, 1990, he contacted TPF&C to discuss options and, in particular, advised that PECo wanted to consider an early retirement sweetener. In response to his requests, Mr. Murdoch, a Vice President of TPF&C, sent a confidential memorandum to Mr. Lefkowitz on March 28, 1990 outlining three alternative "open window" programs for a proposed staff reduction, the first of which was the same early retirement program which had been initially considered in June, 1988!

In April, 1990, PECo senior management continued their concerted effort, with the help of TPF&C and McKinsey, to meet Mr. Paquette's goal of reducing costs and looked at early retirement incentive options as the method for reducing the work force to achieve that goal. The various studies, meetings, and reports generated during these planning efforts ultimately resulted in the announcement made by Mr. Paquette on April 19, 1990 to recommend a retirement incentive package.

Clearly, affirmative steps were being taken by PECo from at least July, 1989, to meet Mr. Paquette's goal of reducing costs and looking at methods of reducing the work force including early retirement options to achieve that goal. It is equally clear that PECo management made a conscious decision not to share that information with the employee population. Mr. Paquette admitted at his deposition that even if Mr. Lefkowitz was considering an early retirement program in March, 1990, he was not authorized to inform employees of that fact. Mr. Lefkowitz acted accordingly and, as he confirmed at his deposition, did not consider letting prospective retirees know in March, 1990, about the possibility that PECo might implement an early retirement program. Indeed, Mr. Lefkowitz intentionally hand wrote his March 28, 1990 "reduction in force" memorandum instead of having it typed in order to maintain confidentiality. The management personnel involved with

the McKinsey study were likewise instructed that their activities were to remain confidential. Mr. Friderichs, who was in charge of coordinating the McKinsey study, acknowledged that it had been the common practice at PECo to maintain confidentiality of discussions about possible proposed or contemplated benefit changes.

Unequivocally, senior management's goal of maintaining confidentiality about their activities, coupled with Mr. Crommie's conscious decision not to seek accurate information from his superiors, had the predictable impact of leaving the retirement counselors in the dark and the prospective retirees without accurate answers to their questions about possible changes to the pension plan.

2. The Kurz Case

On July 2, 1987, PECo issued an official bulletin to their employees announcing an improved minimum formula for the calculation of pension benefits to be effective August 1, 1987. The respondents had retired from January 1 through June 1, 1987 and, therefore, were denied eligibility for these enhanced benefits. The pension benefits they received were calculated under the old formula which was long recognized by PECo as being lower than average for the utility industry.

Initial discussions regarding amendment of the pension plan began at least two years before its official adoption. Significantly, by the time respondents were making their retirement decisions, PECo had already anticipated the need to make improvements to the pension plan and, in fact, had set a target date by which to accomplish this goal. PECo, however, made a conscious decision not to disclose this information to prospective retirees before the official announcement of the amendment on July 2, 1987. As a result, the respondents were falsely told that there were no plans to amend the pension plan in response to questions posed to their retirement counselors and/or supervisors at a time when they were making important decisions about the timing of their retirement.

The extensive history of PECo's planning efforts in developing the amendment to the Service Annuity Plan, summarized

as follows, proves that "serious consideration" was being given to a change in the Service Annuity Plan to enhance pension benefits since at least June, 1986 and possibly earlier:

(a) In 1985, at the request of PECO's Finance Division, TPF&C, the actuarial consultant for PECO, was asked to perform an analysis for a long-term financial planning study, including a projection of PECO's future pension obligations.

(b) In the March, 1985 preliminary study issued by TPF&C, an increase from .30% to .35% of the multiplier used to calculate Part B pension benefits was identified at the request of PECO as a projected improvement to be implemented January 1, 1988.

(c) This projected pension improvement was part of the improvement which was actually adopted August 1, 1987.

(d) Over a period of years before 1987 there was growing interest at PECO in adjusting the pension plan formula to improve benefits.

(e) In 1985 and 1986, senior management in the Personnel and Industrial Relations Department at PECO were discussing alternative methods for improving pension benefits to bring PECO into a more competitive position.

(f) In June, 1986 Mr. Crommie, the Director of PECO's Benefits Division, informed management of the continuing deterioration of the pension plan and stated that changes might be considered to alleviate that situation.

(g) On June 23, 1986, Mr. Ronald Downs, in response to a question posed by Mr. Crommie, acknowledged that "some input from TPF&C will be required with regard to our recommended modifications to plan!" This confirms that in mid-1986, PECO had already anticipated making recommendations to improve the pension

plan based on the 1986 industry-wide pension survey it was conducting.

(h) On February 27, 1987, after reviewing the pension survey data collected from the industry-wide study conducted by PECO, Mr. Beaver, PECO's Administrative Assistant in the Benefits Division, called Mr. Fleischer at TPF&C and requested cost calculations for a pension formula that represented a change to the pension plan.

(i) By March 3, 1987, TPF&C was already evaluating alternative proposals for a change to the pension plan.

(j) On March 5, 1987, Mr. Fritz attended a meeting of the IGA Executive Committee during which he commented that the timing was right to make a significant change to the pension plan and that PECO had already been looking at different ways of doing so.

(k) By the end of March, 1987, TPF&C calculated benefit projections for all PECO officers under the Service Annuity Plan as it existed and under four different proposals for improvement to the plan.

(l) On April 2, 1987, Mr. Fleischer of TPF&C sent Mr. Beaver rough cost estimates of four alternative changes to the Service Annuity Plan.

(m) By early April, 1987, Mr. Crommie was aware that PECO management had requested information from Mr. Beaver about various pension plan formulas and participated in conversations with TPF&C regarding calculations for PECO officers under various proposals.

(n) On April 14, 1987, Mr. Fleischer of TPF&C sent a draft memorandum to Mr. Fritz for presentation to his superiors discussing actuarial assumptions in light of proposed changes to the Service Annuity Plan.

(o) At the April 24, 1987 IGA Executive Committee Meeting, Mr. Fritz confirmed again that it was time to make a change in the pension plan, that PECO had looked into a number of pension calculation formulas, that he had already discussed the formulas with Mr. Everett and Mr. Austin, and that although not cast in concrete, the pension improvement package would be announced on July 2, 1987.

(p) On May 5, 1987, Mr. Beaver prepared a plan to announce the improved pension plan after passage by the Board of Directors; the memo he sent to this effect emphasized the need to maintain "utmost confidentiality" prior to approval by the Board of Directors.

(q) On May 13, 1987, Mr. Beaver and Mr. McGinley of PECO advised Mr. Fleischer of TPF&C that there had at least been some "informal commitment" that an improvement to the pension plan was coming.

(r) On May 14, 1987, Michael Crommie received a letter from Mr. Fleischer at TPF&C outlining annual pension expense should any of the possible changes to the Service Annuity Plan be made.

(s) On May 27, 1987, the Employee Services Division of PECO recommended that PECO adopt a specific proposed improvement to the pension plan to be effective August 1, 1987, specifically noting that the time for a pension change as discussed in the meeting of October 2, 1985 had arrived. This confirms that PECO had anticipated this improvement to the pension formula at least two years before plaintiffs' retirement!

(t) On May 28, 1987, Mr. Fritz received the approval of Mr. Everett and Mr. Austin to recommend a proposal to the Board of Directors to increase pension benefits.

The facts established of record in this case likewise document that PECo intentionally withheld information regarding its planning efforts from the respondents. Indeed, the evidence of the petitioners' conduct was so iron clad that the District Court acknowledged that PECO had an actual policy of keeping potential changes to the pension plan confidential before being voted on by the Board of Directors. Respondents presented glaring evidence of the nature and extent of the misrepresentations made by PECo. For example, defendant, Charles L. Fritz, PECO's Vice President of Personnel and Industrial Relations, claims that he thought it was important that potential retirees at least be told, in answer to questions regarding this matter, that the IGA (an employee organization) was in fact asking for improvements to the pension plan because:

> "I think it would be wrong for the interviewer to say that nothing was being discussed or looked into. I think it would have been dishonest, and we certainly try to be completely above board in this area." [Fritz Deposition, pps. 160-161].

Yet, in March, 1987, after he had specifically told the IGA that 1987 was the right time to make such a change to the pension plan, Mr. Fritz intentionally did not inform Mr. Crommie, supervisor of the retirement interviewers, of this fact, claiming that "he didn't need to know many of these things at that time...." [Fritz Deposition, p. 84]. Mr. Fritz made it impossible for his own policy of informing prospective retirees of the IGA's request for improved pension benefits to be carried out since he admittedly withheld this information. As a result, respondent, Donald Kurz, whose retirement interview was on March 6, 1987 – the day after Mr. Fritz's meeting with the IGA Executive Committee – was only told the following in response to his questions posed to Mr. McCartney regarding any "sweeteners" and whether he was hurting himself by leaving before August 1, 1987:

> "[McCartney's] response to me was, as far as I know, no, there is nothing coming out that would be beneficial to you. He said if anything was coming out, our department would be the first one to know about it and he said, if he knew something, I would tell you, not what it was, but I would tell you hang in for another two months until August 1 for your own benefit." [Kurz Deposition, p. 26].

Mr. Kurz retired on June 1, 1987 without the benefit of the information Vice President Fritz said he was entitled to receive and, as a result, was deprived of the substantial increase in pension benefits provided to those employees who retired on or after August 1, 1987.

This and many other examples which were cited to the court below confirm that not only did the respondents question whether or not any improvements to the pension plan were forthcoming, but also that they were routinely told that there were no such plans. Given the extensive history of planning for the enhanced pension formula, which began as early as 1985, and the continual activity aimed at implementing this change by the target date originally selected in 1985, there can be no dispute that "serious consideration" was being given to such a change to the pension plan at the relevant time period when the respondents were asking pertinent questions and basing their plans on the responses received from the people they were depending upon for accurate information. Similarly, given the admitted practice by PECO of not disclosing information regarding changes to the pension plan before the Board of Directors makes a decision, and the overwhelming testimony concerning the efforts to maintain confidentiality about the plans for such a change, it cannot be disputed that affirmative misrepresentations were communicated to the respondents in response to their questions regarding this matter.

D. The Proceedings Below

Despite the extensive evidence in both cases, as outlined above, the District Court in each case decided that there were no material misrepresentations made to respondents because PECo had not given "serious consideration" to changing the pension plan until such plans were officially announced. The District Court granted summary judgment in favor of the petitioners. The Court of Appeals relied upon convincing factual evidence to conclude that the District Court's characterization of the record as lacking evidence of material misrepresentations by PECo was incorrect and therefore reversed and remanded the case for trial. In so deciding, the Court rejected PECo's explanation that since the company had never told the benefits counselors that it was considering changes to the pension plan, then the counselors' representations to the respondents, that no such plans were being contemplated, were truthful, holding:

> "This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by PECo as plan administrator. These obligations cannot be circumvented by building a chinese wall around those employees on whom plan participants reasonably rely for important information and guidance about retirement." [*Petitioners' Appendix, A-10*].

The petitioners filed a Petition for Rehearing and Rehearing En Banc making many of the same arguments as presented to this Court. Nine judges out of 12 denied the rehearing.

SUMMARY OF THE ARGUMENT

It is of utmost significance that the Third Circuit determined in both the Fischer and Kurz cases that questions of material fact remained unanswered, thereby precluding summary judgment and necessitating remand to the District Court for resolution. [*Appendix to Petition, A-11 and A-19-20*]. Given the outstanding issues of material fact yet to be decided and, consequently, the lack of finality in this case, it is submitted that review by the United States Supreme Court is premature.

More importantly, the issues decided by the Third Circuit in these cases are not of the caliber requiring review by the United States Supreme Court for the following reasons:

1. The Third Circuit correctly defined a plan administrator's fiduciary duties under ERISA, specifically holding: "A plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. Put simply, when a plan administrator speaks, it must be speak truthfully." [*Petitioners' Appendix, A-10*];

2. This holding of the Third Circuit effectuates the purpose for which ERISA was enacted, as defined by the Supreme Court. That is, it enforces strict fiduciary standards of care and promotes the best interests of participants and beneficiaries;

3. The decision of the Third Circuit is in accord with the decisions of other circuits who have addressed the specific issues in question. Those cases referred to by the petitioner as being in conflict with the Third Circuit analysis are factually distinguishable, and, therefore, legally irrelevant to the determination of whether certiorari is warranted.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Petitioners' Writ for Certiorari is Premature.

The Third Circuit remanded both the Fischer and Kurz cases to the District Court for resolution of the factual issue of whether the particular communications PECo made to the respondents constituted affirmative misrepresentations. This determination, according to the Court, requires an analysis of whether the affirmative misrepresentations were material; in the present context, the Court concluded a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. [*Petitioners' Appendix, A-11*]. It would also include inquiry into the seriousness with which a particular change to an employee pension plan was being considered at the time the misrepresentations were made. The Court concluded that in each case there remained open questions of how seriously PECo was considering changes to the pension plan at the time when the respondents made various inquiries that elicited the misrepresentations. While the petitioners repeatedly and erroneously argues that the parties in each case agreed that the facts are not in dispute, the Court's conclusion that material facts are in issue is easily documented. Respondents claim in both the Fischer and Kurz cases that PECo initiated steps to implement changes to the pension plan at least two years before the official announcements and continued with increasing seriousness to consider such plans, as demonstrated by the numerous meetings, the hiring of outside actuarial consultant and the various studies to, in the Fischer case, reduce the work force and in the Kurz case, to improve pension benefits to meet industry standards. Petitioner, on the other hand, vigorously argued in both the District Court and the Third Circuit, that serious consideration had not been given to implement changes to the pension plan until, at the very earliest, management affirmatively decided to make such a recommendation to the Board of Directors. As is evident from the Third Circuit's opinion, the determination of when PECo was seriously considering changes to the pension plan is a key factual issue in both cases and is clearly in dispute among the parties.

A factual determination of these important issues is essential to place the effect and impact of the Third Circuit's opinion upon the fiduciary duties of a plan administrator under ERISA in perspective. At this stage of the proceedings, with these factual issues unresolved, it is unclear how the mandate of the Third Circuit regarding a plan administrator's responsibilities will be applied to PECo under the circumstances of these cases. As such, it is premature for the United States Supreme Court to grant certiorari to review the issue presented by the petitioner. See, e.g., Toilet Goods Association v. Gardner, 387 U.S. 158, 163-164, 87 S. Ct. 1520, 18 L. Ed.2d 697 (1967) [a challenge to agency regulations where it is not clear whether, or in what manner, the regulations will be applied to the claimant is not ripe for adjudication].

II. There Are No Special or Important Reasons which Would Warrant this Court to Grant Certiorari.

A. The Decisions of the Third Circuit Correctly Define the Plan Administrator's Fiduciary Duties to Plan Participants under ERISA.

Consistent with the controlling case law of Payonk v. HMW. Industries, Inc., 883 F.2d 221, 225 (3d Cir. 1989), the Third Circuit in the Fischer and Kurz cases held that a plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. As articulated by Judge Feinberg, "Put simply, when a plan administrator speaks, it must speak truthfully." Fischer v. Philadelphia Electric Co., 944 F.2d 130, 135 (3d Cir. 1993). There is nothing so novel or exceptional about this decision which warrants such extraordinary relief as review by the United States Supreme Court. Indeed, certiorari was recently denied by this Honorable Court in a case in which the issue presented was virtually identical to the question presented in the cases sub judice. See, Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), cert. den., 113 S.Ct. 2416 (1993).

First, petitioners' protestations that the Third Circuit's decisions impermissibly expands the fiduciary and disclosure requirements as codified in ERISA ignores the Supreme Court's

determination that "rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility" in passing ERISA. Central States v. Central Transport, Inc., 472 U.S. 559, 570, 105 S.Ct. 2833, 2840, 86 L. Ed.2d 447 (1985). Significantly, the concept that a fiduciary duty includes the obligation to refrain from making material misrepresentations is deeply rooted in the common law of trusts. Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 750 (D.C. Cir. 1990) ["the duty to disclose material information is the core of a fiduciary's responsibility, emanating from the common law of the trust long before the enactment of ERISA."] The Restatement of Trusts (Second) specifically admonishes:

> "[The Trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person... Restatement (Second) of Trusts, §173, comment d (1959).

Simply stated, the obligation of a fiduciary to communicate honestly and refrain from making affirmative misrepresentations to those with whom he is in a trust relationship is the foundation of trust law; the imposition of this fiduciary duty upon plan administrators under ERISA is entirely consistent with Congress' expressed intent to invoke the common law of trusts to define the general scope of their authority and responsibility.

Secondly, the fact that this obligation to speak truthfully is imposed upon a plan administrator who is also the employer of the plan participants is not inconsistent with the statutory authority for an employer to act simultaneously as a plan sponsor and plan administrator. Indeed, the Third Circuit expressly acknowledged that under ERISA, an employer is allowed to wear "two hats" as both employer and plan administrator. The Court also reaffirmed

that as an employer, neither PECo nor its business decisions were subject to ERISA's fiduciary duties. PECo seized upon this distinction and argued that since PECo the employer never told PECo the plan administrator (the benefits counselors) that it was considering a change to the pension plan, the counselors were telling the truth when they informed the respondents that they knew of no such plans and, therefore, there were no affirmative misrepresentations. The Court found this argument unpersuasive specifically holding:

> "This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by PECo as plan administrator. These obligations cannot be circumvented by building a chinese wall around those employees on whom plan participants reasonably rely for important information and guidance about retirement." Fischer v. Philadelphia Electric Co., supra., 944 F.2d at 135; see also, Kurz v. Philadelphia Electric Co., 944 F.2d 136, 139 (3d Cir. 1993).

Now, before this Court, PECo takes a slightly different tact, arguing that the communication or lack thereof to employees about decisions to amend the pension plans were part of PECo's business activities to which fiduciary duties do not apply. Such a strained interpretation of the two-hat rule is inconsistent with ERISA when viewed from the perspective of the plan participant whose interests ERISA was designed to protect. That is, when the respondents went to their retirement interviews and asked questions regarding potential changes to the pension plan, they understandably expected the benefits counselor to provide complete, accurate and truthful information. These loyal employees had no reason to suspect that PECo the employer would withhold from the benefit counselors information which these potential retirees considered vital to their retirement decision. After all, the benefit counselors were specifically charged with the responsibility of providing information

regarding pension benefits. Both PECo the employer and plan administrator knew full well that these potential retirees were asking questions about possible changes to the plan. PECo the employer also knew full well that the answers disseminated by the benefits counselors -- that no such plans were being contemplated -- were inaccurate. To accept petitioners' argument that as an employer, PECo had no fiduciary responsibilities to correct the misinformation it knew was being disseminated would effectively abolish the fiduciary protection from misrepresentations afforded to plan participants under ERISA. In short, to allow PECo to unilaterally choose to wear only the employer hat when communicating with plan participants would undercut the purpose of ERISA to enforce strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 158, 105 S.Ct. 3085, 3098, 87 L. Ed.2d 96 (1985).

Third, all of PECo's arguments as to the calamitous consequences that will ensue if the Court of Appeals' decisions are upheld are based upon the assumption that the Third Circuit has imposed a duty upon PECo to disclose its internal business deliberations, negotiations, and activities to the employee population. Neither the Third Circuit nor respondents are suggesting that the employer has an affirmative duty to disclose all of its business negotiations and dealings; nor is the employer faced with the obligation to predict with precision future amendments to the plan. The Third Circuit specifically held:

> "An ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan. Rather, its obligation is to answer participants' questions forthrightly, 'a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining process.'" Fischer, supra., 994 F.2d at 135 quoting, Drennan v. General

Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992), cert. den., 113 S.Ct. 2416 (1993).

As a practical matter, the Third Circuit's decisions give rise to one simple rule as articulated by Judge Feinberg in the Fischer case: "When a plan administrator speaks, it must speak truthfully." Fischer v. Philadelphia Electric Co., supra., 994 F.2d at 135. Under the precise factual scenarios presented to this Court, this rule only required PECo to truthfully answer the respondents' questions by acknowledging that plans to enhance pension benefits were being considered. The Third Circuit's opinion requires no predictions as to the eventual adoption of such plans nor does it compel PECo to disclose all of the business dealings and negotiations involved in developing the amendment to the pension plan.

In an effort to manufacture special and important reasons for granting certiorari, PECo invites the Court to review various speculative factual scenarios which far exceed the circumstances of the present cases. Both the Fischer and Kurz cases involved a narrowly-tailored, specific factual setting where the plan administrator was fully cognizant that the subordinates it appointed to answer important pension benefit questions was unwittingly providing inaccurate information in response to the plan participants' specific questions regarding changes to the pension plan. There is nothing extraordinary or novel about holding the plan administrator accountable for the misrepresentations under this factual scenario. As articulated by the Third Circuit, "this duty to communicate complete and correct material information about a beneficiary's status and options is not a novel idea." Fischer v. Philadelphia Electric Co., supra., 994 F.2d at 135, quoting, Eddy v. Colonial Life Ins. Co., 919 F.2d 747, 751 (D. Ct. Cir. 1990). Accordingly, it is submitted that the Court should not give deference to the far-fetched examples of the dire consequences PECo conjures up to persuade the Court to grant certiorari.[2]

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[2] Parenthetically, petitioners cite the case of Zschunke v. Bell Atlantic Corporation, C.A. No. 93-CV-3326 as an example of a case which expands the PECo cases since the personnel conveying the

B. The Decisions of the Third Circuit Effectuate the Policies under ERISA as Defined by the Decisions of this Court.

The petitioners on the one hand vigorously argue that the Third Circuit's decisions are in conflict with decisions of the United States Supreme Court while on the other hand they concede that this Court has never addressed the issues concerning the fiduciary responsibilities under the factual setting of the Fischer and Kurz cases. In reliance upon this Court's recent decision in Mertens v. Huyett Associates, 113 S.Ct. 2063, 124 L. Ed.2d 161 (1993), PECo argues that the Third Circuit decisions are in conflict with this Court's expressed reluctance to expand ERISA beyond the language of the statute adopted by Congress. This argument, however, is based upon the erroneous factual predicate that the Third Circuit expanded the obligations of a fiduciary under ERISA. To the contrary, the impact of the Third Circuit's decision -- to assure that plan administrators comply with their fiduciary obligations to speak truthfully to plan participants -- effectuates the underlying purpose of ERISA to enforce strict fiduciary standards of care in the administration of all aspects of pension plans and the promotion of the best interests of participants and beneficiaries. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 158, 105 S.Ct. 3085, 3098 (1985). Far from expanding the scope of ERISA, it is evident that in ruling that PECo, as the plan administrator had a fiduciary obligation to answer participants' questions forthrightly, the Court adhered to well-established principles of trust law.

Significantly, this Court has consistently held that ERISA was grounded in the common law of trusts and, more importantly, that the Court was to be guided by principles of trust law in construing the terms of the statute. Firestone Tire & Rubber Co.

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misinformation were supervisors, not benefit counselors. What the petitioners failed to apprise the Court, however, is that these supervisors were given an express directive from the Human Resources Department to answer the questions of potential retirees regarding possible changes to the pension plan by stating that no such plans were being considered for the near future. This factual setting is virtually indistinguishable from the PECo cases.

v. Bruch, 489 U.S. 101, 111, 109 S.Ct. 948, 103 L. Ed.2d 80 (1989). Indeed, in the Firestone case, supra, this Court has made the following pertinent observations:

1. ERISA "abounds with the language and terminology of trust law" and must be construed against the background of the common law of trusts. Id. at 110-111, 109 S. Ct. at 954-955;

2. Absent some express statutory departure, Congress intended that the courts would look to the settled experience of the common law in giving shape to a "federal common law of rights and obligations under ERISA-regulated plans." Id., 489 U.S. at 110, 109 S.Ct. at 954; see also, Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., supra.;

Succinctly, the Third Circuit decisions are unequivocally premised upon traditional concepts of trust law and, as such, are entirely consistent with this Court's instructions to construe ERISA against the background of the common law of trusts.

C. The Decisions of the Third Circuit are Not in Conflict with the Decisions of Other Courts of Appeals.

The petitioners have correctly advised the Court that the decisions of the Third Circuit are entirely consistent with the decisions of the Sixth Circuit in the cases of Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), cert. den., 113 S.Ct. 2416 (1993) and Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988). In each case, the Sixth Circuit specifically held that a plan administrator had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the offering of enhanced benefits when such plans were under serious consideration. Contrary to PECo's representations, neither the Sixth Circuit nor the Third Circuit has compelled an employer to disclose its business deliberations to plan participants. As confirmed by the Sixth Circuit in Drennan and

repeated by the Third Circuit in Fischer, the obligation of an ERISA fiduciary is to answer participants' questions forthrightly, "a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining process." Drennan v. General Motors, supra, 977 F.2d at 251 quoted in Fischer v. Philadelphia Electric Co., supra, 994 F.2d at 135.

It is significant that, in contrast to the Fourth and Seventh Circuit Court of Appeals cases cited by petitioners as examples of decisions in conflict with the Third Circuit decisions, the Sixth Circuit opinions in Drennan, supra, and Berlin, supra, are virtually identical to the factual circumstances presented in the Fischer and Kurz cases. Because of this factual disparity, it is erroneous for the petitioners to argue that the decisions of the Fourth and Seventh Circuits are in conflict with the decisions of the Third and Sixth Circuits, thereby warranting review by the United States Supreme Court. For example, in Elmore v. Cone Mills Corp., Nos. 92-1362, 92-1363, 92-1404, 92-1482, 1993 WL 368872 (4th Cir. September 22, 1993), the employer had sent letters to employees in connection with a leveraged buy-out stating its proposed intention to contribute certain surplus assets in the employee retirement plan to an employee stock ownership plan. The employer specifically qualified this proposal, advising that "we are, however, giving you information now based on our present plans which are subject to revision to meet changing situations." Upon completion of the buy-out, the employer failed to make the surplus contribution in full. It is significant that in denying the plaintiffs' claim to the additional surplus assets, the Court concluded that "there is no evidence that Cone Mills was untruthful regarding its intentions when the communications at issue were made. In addition, the record reflects that Cone Mills was careful in drafting the December letters to alert its employees that all plans were tentative and subject to change." Elmore, supra., 1993 WL 368872 at *26. The factual distinction between Elmore and the Fischer and Kurz cases is obvious and compels the conclusion that these cases do not represent a conflict among the circuits concerning fiduciary obligations owed under ERISA.

The case of Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986) is subject to the same factual discrepancies as the Elmore case. In Stanton, the Court held in dicta that it is not a violation of ERISA to fail to furnish information regarding potential amendments before they are put into effect. The Stanton court, however, recognized that the plaintiffs' claims of misrepresentation were not supported by the evidence, implying that such misrepresentations, if proven, would violate ERISA. Id. at 435.

The decisions of the Seventh Circuit are equally unavailing to the petitioners' argument that a conflict exists among the Courts of Appeals. Young v. Standard Oil (Indiana), 849 F.2d 1039, 1045 (7th Cir. 1988), cert. den., 488 U.S. 481, 109 S.Ct. 529 (1988) dealt only with a failure to disclose information about a severance pay plan (which in and of itself is distinct and different from a pension benefit plan which is subject to more scrutiny under ERISA); there were no allegations of misrepresentation, thereby rendering the Young decision irrelevant to the Third Circuit opinions regarding the fiduciary obligations to refrain from making affirmative material misrepresentations concerning changes to a pension plan.

United Independent Flight Officers v. United Airlines, 756 F.2d 1274 (7th Cir. 1985) merely held that an employer did not act as the fiduciary while negotiating a collective bargaining agreement, because of the obviously conflicting roles of fiduciary and negotiator. Where, as here, however, misrepresentations are made about the potential changes to an ERISA pension plan, clearly ERISA's fiduciary duties to speak truthfully apply.[3]

Succinctly, the artificial conflict which the petitioners zealously attempt to define among the Circuit Courts of Appeals, is

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[3] The remaining cases cited by the Petitioners, Belade v. ITT Corp., 909 F.2d 736 (2nd Cir. 1990); Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir. 1989) cert. den., 493 U.S. 919 (1989); and Fletcher v. Kroger Co., 942 F.2d 1137 (7th Cir. 1991) are so factually irrelevant to the issues decided by the Third Circuit Court of Appeals as to render further comment unnecessary.

illusory and, therefore, does not provide a legitimate basis for review by the Supreme Court.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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